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ABDUL RASHID MOHAMAD ISA v. PTT INTERNATIONAL TRADING PTE LTD

COURT OF APPEAL, PUTRAJAYA
RAVINTHRAN PARAMAGURU JCA
HASHIM HAMZAH JCA
B LIM CHONG FONG JCA
[CIVIL APPEAL NO: B-03(IM)(NCC)-76-07-2022]
21 FEBRUARY 2024

C **Abstract** – *Where an application to set aside a bankruptcy notice is still pending for disposal, the withdrawal of a creditor's petition will not necessarily cause a bankruptcy proceeding commenced against a judgment debtor ('JD') to be terminated. In such a circumstance, the act of bankruptcy on the part of the JD would be stayed pursuant to r. 93 of the Insolvency Rules 2017.*

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BANKRUPTCY: *Creditor's petition – Application to withdraw – Judgment creditor ('JC') applied to withdraw creditor's petition – Withdrawal allowed by Registrar, but held bankruptcy proceeding commenced against judgment debtor ('JD') had come to end – JC appealed against Registrar's decision and allowed by* E *High Court – JD's appeal against High Court decision – Whether High Court Judge erred in fact and law by failing to appreciate withdrawal of creditor's petition had terminated and ended bankruptcy proceeding against JD – Whether act of bankruptcy occurred considering application to set aside bankruptcy notice still pending*

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On 17 December 2018, the judgment creditor ('JC') served a bankruptcy notice ('BN') upon the judgment debtor ('JD') for RM59,567,505.93 to which the JD was given seven days from the date of its service to reply and effect the necessary payment. This prompted the JD to file a summons-in-chamber to set aside the said BN, but without any accompanying affidavit G under r. 93(1) of the Insolvency Rules 2017 ('IR'). The JD also did not make any payment of the outstanding sum as mentioned under the BN. This caused the Registrar to find that the JD had committed an act of bankruptcy on 25 December 2018. Therefore, the JD filed an appeal to the judge-in-chambers to set aside the said decision. Meanwhile, the JC filed a creditor's H petition against the JD. Nonetheless, since the High Court Judge ('HCJ') had allowed the JD's appeal to the judge-in-chambers and held that there was no act of bankruptcy committed by the JD since the same had already applied to set aside the BN, the JC decided to withdraw the creditor's petition against the JD. Thus, the Registrar allowed the JC's application to withdraw the said I creditor's petition. However, the Registrar also decided that: (i) considering the creditor's petition had been withdrawn by the JC, the bankruptcy action against the JD had come to an end; and (ii) the JC was out of time to file

any creditor's petition since the act of bankruptcy had occurred on 25 December 2018. Aggrieved, the JC then filed an appeal to the judge in chambers. On the other hand, the JD applied to the same to set aside the JC's appeal. The HCJ, after hearing both parties, allowed the JC's appeal, while the JD's application to set aside the said appeal was dismissed. Hence, the present appeal by the JD. The issue that arose was whether the HCJ had erred in fact and law by failing to appreciate that the withdrawal of the creditor's petition had terminated and ended the bankruptcy proceeding against the JD.

Held (dismissing appeal with costs)
Per Hashim Hamzah JCA delivering the judgment of the court:

(1) Although the amount stated under the BN had not been paid within seven days, an application to set aside the BN under r. 17 of the IR had been filed by the JD before 25 December 2018, through encl. 6. The said enclosure was not included in the appeal records, but the parties did not dispute that encl. 6 was the JD's application to set aside the BN. The parties also did not dispute that encl. 6 was still pending for hearing and determination. The HCJ found that the act of bankruptcy had not occurred since encl. 6 was yet to be disposed of. This finding was agreed to by this court. The act of bankruptcy did not occur on 25 December 2018 as there was a pending application to set aside the BN. This was regardless of whether the said application was made under r. 17 of the IR or otherwise since it came within the ambit of r. 93 of the IR. Hence, as encl. 6 had not been heard and disposed of, the act of bankruptcy had been stayed according to r. 93 of the IR. It was thus premature at this stage to argue whether the bankruptcy proceeding had been terminated, especially when the creditor's petition was withdrawn with the liberty to file afresh. (paras 23-27)

Case(s) referred to:
Re Subramaniam Paidathally; ex-Parte: G Ragumaren & Co [2011] CLJU 1594; [2011] 1 LNS 1594 HC ***(dist)***

Legislation referred to:
Insolvency Act 1967, s. 3(1)(i)
Insolvency Rules 2017, rr. 17, 93(1), (2)

For the appellant - Chan Siew Cheong; M/s Teh & Lee
For the respondent - Neo Chi Chyn; M/s Firoz Julian

[Editor's note: Appeal from High Court, Shah Alam; Bankruptcy No: BA-29NCC-1742-03-2019 (affirmed).]

Reported by Syamim Ariffin

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JUDGMENT

Hashim Hamzah JCA:

Introduction

B **[1]** For ease of reference, the parties in this appeal shall be referred to as they were before the High Court below.

[2] This is the judgment debtor's ("JD") appeal against the decision of the learned High Court Judge ("HCJ") delivered on 22 June 2022 in which the judgment creditor's ("JC") appeal to the judge in chambers was allowed.

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Brief Facts

[3] Briefly, the facts leading to the present appeal are as follows.

[4] On 17 December 2018, the JC served a bankruptcy notice to the JD for an amount of RM59,567,505.93, and the JD had seven days from the date of service to reply and make payment (until 24 December 2018).

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[5] On 21 December 2018, the JD filed a summons in chambers to set aside the bankruptcy notice. However, the JD did not file any affidavit under r. 93(1) of the Insolvency Rules 2017 ("IR 2017").

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[6] On 22 January 2019, the learned Registrar found that the JD had committed an act of bankruptcy on 25 December 2018 because the JD did not file any affidavit under r. 93(1) of IR 2017 and did not make any payment of the outstanding sum stated in the bankruptcy notice to the JC. Consequently, the JD filed an appeal to the judge in chambers against the said decision.

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[7] On 19 June 2019, the JC filed a creditor's petition against the JD.

[8] On 7 October 2020, the learned HCJ allowed the JD's appeal and held that there was no act of bankruptcy because the JD had already applied to set aside the bankruptcy notice.

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[9] On 5 December 2021, the JC informed the court that it would like to withdraw the creditor's petition since the High Court held that there was no act of bankruptcy on the part of the JD.

[10] On 6 December 2021, the learned Registrar allowed the JC's application to withdraw the creditor's petition with the liberty to file afresh. However, the learned Registrar also decided that since the JC had withdrawn the creditor's petition, the bankruptcy action against the JD came to an end, and the JC was already out of time to file any creditor's petition since the act of bankruptcy had occurred on 25 December 2018.

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I **[11]** Dissatisfied with the decision of the learned Registrar, the JC filed an appeal to the judge in chambers on 17 December 2021. On the other hand, the JD applied to set aside the JC's appeal. The JC's appeal and the JD's application to set aside the appeal were heard together.

[12] On 22 June 2022, after hearing both parties, the learned HCJ had allowed the JC's appeal and dismissed the JD's application to set aside the appeal. The JD then appealed against the decision of the learned HCJ. The appeal was heard before us.

Issues

[13] The core issue in the instant appeal is whether the learned HCJ had erred in fact and law in failing to appreciate that the withdrawal of the creditor's petition would terminate and end the bankruptcy proceeding against the JD.

Our Findings

[14] Learned counsel for the JD submitted that the learned HCJ failed to appreciate that the withdrawal of the creditor's petition would terminate and end the bankruptcy proceeding against the JD.

[15] Learned counsel for the JD cited *Re Subramaniam Paidathally; ex-Parte: G Ragumaren & Co* [2011] CLJU 1594; [2011] 1 LNS 1594 in support of their submission.

[16] In *Re Subramaniam* (*supra*), the learned Registrar had struck out the first judgment creditor's petition, which was grounded on the error in stating the correct date of the judgment debtor's act of bankruptcy. The judgment creditor did not appeal against the decision but instead filed a second creditor's petition based on the corrected date of the judgment debtor's act of bankruptcy.

[17] The Registrar proceeded to strike out the second creditor's petition on the ground that the judgment creditor could not file another creditor's petition based on the same act of bankruptcy once the first creditor's petition was dismissed. The recourse available to the judgment creditor was either to appeal against the dismissal or to start the proceeding afresh. On appeal, the learned HCJ had affirmed the decision of the Registrar and dismissed the judgment creditor's appeal.

[18] The abovementioned case was cited by learned counsel for the JD for the proposition that once a creditor petition is struck out or withdrawn, the bankruptcy proceedings will come to an end and a subsequent creditor petition cannot be filed based on the same act of bankruptcy that was relied upon by the earlier creditor's petition. Thus, even if six months had not lapsed from the date of the act of bankruptcy, a subsequent petition cannot be filed. In *Re Subramaniam* (*supra*), the learned High Court Judge acknowledged that there is no express provision in the Bankruptcy Act on this question. Be that as it may, His Lordship ruled that a second petition cannot be filed based on the same act of bankruptcy as the first petition terminated all bankruptcy proceedings. However, in our opinion, the abovementioned case can be distinguished on the facts for the following reasons.

[19] In *Re Subramaniam* (*supra*), because of the uncorrected mistake as to the date of bankruptcy, the JD filed an application to strike out the bankruptcy petition. In the instant case, there is no issue of a mistake in respect of the date of bankruptcy on the part of the JC. It was the Registrar who "declared" that the act of bankruptcy was committed on 25 December 2018 although the application of the JD to set aside the BN was still pending. This mistake of the Registrar was corrected by the learned High Court Judge on 7 October 2020. The JD then moved to strike out the creditor's petition but the JC was allowed to withdraw the petition with liberty to file afresh. In *Re Subramaniam* (*supra*), the creditor's petition, was struck out by the Registrar without any reservation of the right of the JC to refile the petition. Therefore, we are of the view, that as the creditor's petition was withdrawn with liberty to file afresh, a second creditor's petition which complies with the six-month period from the date of the act of bankruptcy is proper and cannot be objected to.

[20] As such, we conclude that the decision in *Re Subramaniam* (*supra*) does not assist the JD in this present appeal.

[21] Based on r. 93(2) of the IR 2017, until the application to set aside the bankruptcy notice has been heard and determined, no act of bankruptcy under the notice shall be deemed to have been committed.

[22] Reverting to the facts of the present case, we are of the considered view that the crucial facts are as follows. Firstly, the bankruptcy notice was issued on 17 December 2018. Therefore, if there was any non-compliance with the bankruptcy notice under s. 3(1)(i) of the Insolvency Act 1967 (Revised 1988) (Act 360) or if no application to set aside the bankruptcy notice has been made under r. 93 of the IR 2017, the act of bankruptcy would have occurred on 25 December 2018.

[23] In the present case, even though the amount stated in the bankruptcy notice was not paid within seven days, an application to set aside the bankruptcy notice under r. 17 of the IR 2017 was already filed by the JD before 25 December 2018 through encl. 6.

[24] We pause here to note that encl. 6 was not included in the appeal records, but the parties did not dispute that encl. 6 is the JD's application to set aside the bankruptcy notice. The parties also did not dispute that encl. 6 is still pending for hearing and determination.

[25] The learned HCJ in his grounds of judgment, found that the act of bankruptcy had not yet occurred since encl. 6 had not been disposed of. The learned HCJ in his decision also directed for encl. 6 to be heard. We agree with the learned HCJ.

[26] In our view, the act of bankruptcy did not occur on 25 December 2018, as there is a pending application to set aside the bankruptcy notice. This is regardless of whether the application was made under r. 17 of the IR 2017 or otherwise since it comes within the ambit of r. 93 of the IR 2017.

[27] Therefore, the act of bankruptcy cannot occur until encl. 6 is heard and disposed of. Since encl. 6 has not been heard and disposed of, the act of bankruptcy has been stayed according to r. 93 of the IR 2017 thus, it is premature at this stage to argue that the bankruptcy proceeding has terminated especially when the earlier petition was withdrawn with liberty to file afresh and it was allowed by the court as we noted earlier.

Conclusion

[28] In conclusion, for reasons enumerated above, we have come to a unanimous decision to dismiss this appeal with costs. We further direct the Deputy Registrar to hear encl. 6 the day after this judgment is delivered, as we agree with the learned HCJ that the application under encl. 8 should be heard expeditiously.

[29] Costs of RM5,000 to be paid by the JD to the JC, subject to allocatur.